



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 26, 2018

Ms. June B. Harden
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2018-29659

Dear Ms. Harden:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 739179 (PIR No. 18-50356).

The Office of the Attorney General (the "OAG") received a request for all reports, correspondence, memoranda, and similar documents relating to a certain incident involving a specified company. The OAG states it will release some of the responsive information. Additionally, the OAG states it will rely on Open Records Letter No. 2018-06425 (2018) and withhold some of the requested information in accordance with that ruling.¹ The OAG claims the submitted information is excepted from disclosure under sections 552.101 and

¹In Open Records Letter No. 2018-06425, this office determined the OAG must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 17.61(f) of the Business and Commerce Code, and may withhold Exhibit C under section 552.103 of the Government Code. See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

552.103 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.²

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information another statute makes confidential. Section 17.61(f) of the Business and Commerce Code provides, in part:

(f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the [OAG] without the consent of the person who produced the material. The [OAG] shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person.

Bus. & Com. Code § 17.61(f). This provision requires the OAG to withhold from required public disclosure all documentary material the OAG obtained pursuant to a Civil Investigative Demand ("CID"). The OAG explains its Consumer Protection Division ("CPD") issued a CID to the specified company under section 17.61(a) of the Business and Commerce Code. The OAG informs us the company at issue complied by providing Exhibit C to the OAG. Thus, we agree the OAG must withhold Exhibit C under section 552.101 because it is information obtained pursuant to a CID, and therefore, is confidential under section 17.61(f).

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure

²We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation might ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

The OAG states the CPD is investigating activity that may constitute violations of law. The OAG further states the CPD launched investigations for enforcement purposes. The OAG explains if the CPD uncovers violations of law during its investigations, the OAG will initiate enforcement proceedings. Upon review, we find the OAG reasonably anticipated litigation regarding these matters when it received the present request for information. The OAG asserts, and we agree, Exhibit B relates to the anticipated litigation. Accordingly, the OAG has demonstrated the applicability of section 552.103 to the information at issue. Thus, the OAG may withhold Exhibit B under section 552.103.

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the OAG must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 17.61(f) of the Business and Commerce Code. The OAG may withhold Exhibit B under section 552.103 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Cole Hutchison", with a stylized flourish at the end.

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/eb

Ref: ID# 739179

Enc. Submitted documents

c: Requestor
(w/o enclosures)